Supreme Court, U.S.
FILED

No. 03-1029 JAN 15 2004

In The

Supreme Court of the United States

CHARLES MCFADDEN;
DORIS MCFADDEN, THE ESTATE OF

Petitioners,

v.

ERIC M. BOST, ETC; ET AL, DEFENDANTS.
DON A. GILBERT, COMMISSIONER OF THE TEXAS HEALTH AND HUMAN SERVICES COMMISSION;
JAMES R. HINE, COMMISSIONER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

COURT ORDER PROVISION AND PRIVATE RIGHT OF ACTION: Is the purpose of the medicaid court order provision to divert these medicaid spousal cases timely from federal district court to state family district courts or to state probate courts? Court dec., p. 7 & 11. Rec. 1457 and 1493.

SECRET MEMOS: ISSUE: Did the J. Johnson letter of June 8, 1998, for the state departments constitute secret rules in violation of the due process clause? App. 19. PX03. Rec. 1064. The 1998 Johnson letter said that no state court order of any kind would bind state welfare, plus it implied that there were no favorable precedents or rules. Further the department was intransigent in early negotiation in the face of three hidden favorable memos and the CMS manual provisions. Court dec., p. 9. Rec. 1495.

ELEVENTH AMENDMENT BAR: Does a federal statute in a grant in aid program which requires a state agency to follow the decisions of state courts implicate the eleventh amendment?

LIST OF PARTIES

The undersigned, counsel of record for Charles McFadden plaintiff appellant couple, certifies that the following listed parties pursuant to rule 29 (Sup. Ct.). Nevertheless this rule does indicate that this certificate is unnecessary for governmental parties.

1. Charles McFadden plaintiff, appellant, community spouse and couple
2. Estate of Doris McFadden plaintiff, deceased patient, appellant and couple
3. James R. Hine, current Commissioner of the Texas Department of Human Services
4. Eric M. Bost, former Commissioner of the Texas Department of Human Services
5. Don A. Gilbert, former Commissioner of the Texas Health and Human Services Commission
6. Albert Hawkins is the current commissioner of the Texas Health and Human Services Commission.
7. The petitioner interprets the court's rule not to include a list of counsel.

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INTRODUCTORY PRAYER

This is a petition for certiorari under 28 U.S.C. sec. 1254. It is timely because it is within ninety days of the denial of a petition for panel rehearing of October 17, 2003. That rehearing petition followed the circuit court's affirmance of September 3, 2003.

This is a medicaid nursing home eligibility case. Medicaid is a state welfare program which pays for nursing home care with federal grants in aid. The McFaddens sued the two commissioners of the Texas state welfare departments. The form of this petition complies with Rules of the Supreme Court, rule 14.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is unpublished. It appears at 73 Fed. Appendix 756. It is styled *McFadden v. Bost*, No. 02-21285. It is dated Sep. 3, 2003. It also appears in the appendix to this petition at appendix 1. The order of the district court is also unpublished and appears in the appendix to this petition at appendix 3. It is dated Aug. 6, 2002. The court issued a one page judgment on the same day. It is styled *McFadden v. Hine*, No. H-01-1060 (S.D.Tex. Aug. 6, 2002).

JURISDICTION

The Fifth Circuit Court of Appeals denied the petition for panel rehearing on October 17, 2003. That rehearing petition followed the circuit court's affirmance of September 3, 2003. Petitioners invoke the supreme court's jurisdiction

under 28 *U.S.C.* sec. 1254(1). The notifications of Rules of S.C., rule 29.4(b or c) are not applicable: challenges to acts of Congress and constitutionality.

CONSTITUTIONAL PROVISION AND STATUTES

The federal medicaid statute says at 42 *U.S.C.* sec. 1396-5(f)(3):

> If a court has entered an order against an institutionalized spouse for the support of the community spouse, section 1396p of this title shall not apply to amounts of resources transferred pursuant to such order for the support of the spouse or a family member . . . 42 *U.S.C.* sec. 1936r-5(f)(3). Cf. 42 *U.S.C.* sec. 1396r-5(d)(5).

The U.S. Department of Health and Human Services, Center for medicare and medicaid services (CMS), State Medicaid Manual says:

> When resources exceed prescribed limits, individuals are ineligible until combined countable resources are reduced to the greater of the following: . . . Court ordered spousal shares . . . ." CMS, *State Medicaid Manual* sec. 3262.2, step. 3 (Oct. 1989). PX64. Rec. 1180. Note the prior name of CMS was the Health Care Financing Administration. HCFA. Olive Depo. p. 17. Rec. 567. The name change occurred in 2001.

42 U.S.C. sec. 1983 says:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. sec. 1983.

The constitution's clauses of due process and equal protection say at the Fourteenth Amendment, sec. 1, as to state action:

> (N)or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

A similar provision applies to the federal government in the Fifth Amendment.

STATEMENT OF FACTS

This is a medicaid nursing home eligibility case. Medicaid is a state welfare program which pays for nursing home care with federal grants in aid. The McFaddens sued the two commissioners of the Texas state welfare departments. The commissioners refused to follow the order of a state district court retroactively, the order of a state probate prospectively and several favorable informal agency memos. They also failed to find spousal hardship.

This case arose on defendant commissioners' motion to dismiss under Fed.R.Civ.P. rule 12(b). Plaintiffs McFadden had also filed a motion for summary judgment after deposition and discovery. The basis for federal jurisdiction in the trial court is 28 *U.S.C.* secs. 1331, 1343(3) and pendent jurisdiction. The cause of action arises on a federal private right of action under 42 U.S.C. sec. 1983 for these provisions of the federal medicaid statute. This petition conforms also with Rule 10(a) of S.Ct. Rules.

Doris McFadden's guardian filed her first medicaid application in September 1997. PX46, para. 19. Rec. 1509. The patient suffered from curls into a fetal position, dementia with agitation and possible alzheimer's disease. Rec. 953 & 1066. Probate Court One had just found her estate reached medicaid levels of $1813 on September 24, 1997. Cf. Rec. 952.

State welfare penalized the guardian for not filing for medicaid five years earlier when the patient first entered the nursing home. Olive Deposition, p.31-32, 36 & 40-57. PX100. Rec. 533-552. Had she filed earlier, state welfare would probably have given her credit for the $221,000 spend down for payment of medical expenses and nursing home rent. Rec. 234. Because she did not file her application when she entered the nursing home, the two hearing officers required her to spend the five years of the spend down all over again, except for $72,000 which was the husband's allowance. The couple never had that much money.

The couple had two state administrative hearings and at least two orders from two state courts. The last state court order was from the 312th family district court. Rec. 957. PX46, p.6 (October 22, 1998). The last administrative

hearing was April 6, 1999. Rec. 904. Drabek, M., Final decision. PX56, p.3. The legal services division of state welfare took the decision as to retroactivity away from the hearing officer. Rec. 901.

In this case, the 312th state district court in October 1998 ordered state welfare to protect $250,000 of the community spouse Charles McFadden. PX046 Rec. 955. The exhibits PX46 (Rec. 955) and PX87 (Rec.791) summarize all these numbers. Plaintiff's exhibit 87. Olive Depo. 20-32. Rec. 564-552. It found that this was the separate property of Charles McFadden while citing the prenuptial agreement (Rec. 855) and the probate court orders and accounts.

The district court also used other language as to merits and as to the more expansive factors which state law required it to evaluate. These were factors which state welfare could not consider. Such factors included the prenuptial agreement (Rec. 855), the demands of a guardianship, the increase in the value of the estate, the subsequent acquisition of more separate property from the death of the husband's mother, the sale of Charles McFadden's plumbing business and the purchase of his pension. Judgment of 312th Dist. Ct., PX46, p.5. Rec. 953-952. Two cases have considered unfavorably the significance of an estate that increased in value since the snapshot at institutionalization in a nursing home. But none of them involved court orders. *AK v. Division of Medicaid*, 794 A.2d 835, 843 (Superior Ct. N.J. 2002) – "not pellucidly drafted." *Estate of Atkinson v. Minnesota Dep't*, 564 N.W.2d 209 (Sup.Ct. Minn. 1997) "appealing . . . interpretation."

Public policy reasons include: first, the expertise of state courts in determining the value of marital estates, if not the traditional venue for these determinations. *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080 (1975). *Daily Income Fund v. Fox*, 464 U.S. 523, 104 S.Ct. 831, 839 (1984). The welfare departments decide the value of marital estates only by presumptions, not ownership. Second, the economy of allowing spouses to first go to a welfare hearing to see if the allowance is adequate before resorting to state court. This second reason would avoid the cost of state court for many couples. Third, the probate court here ratified the prenuptial order and supervised the spenddown in a guardianship. Fourth, there is no federal law of family. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct. 802 (1979). Family law is "preeminently (a) matter of state law." *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023 (1989). Fifth, the virtue in making consistent the value of marital estates between state courts and state agencies. See also *New Mexico Dep't v. Dep't of Health & HS*, 4 F.3d 882 (10th Cir. 1993) – community property in monthly check.

REASONS FOR GRANTING THE WRIT

COURT ORDER PROVISION AND PRIVATE RIGHT OF ACTION:

Is the purpose of the medicaid court order provision to divert these medicaid spousal cases timely from federal district court to state family district courts or to state probate courts? Court dec., p. 7 & 11. Rec. 1457 and 1493.

RESTATEMENT OF ISSUE AS TO CIRCUIT CONFLICT

Does the district court decision finding no private right of action under 42 *U.S.C.* sec. 1983 violate *Wisconsin Department v. Blumer*, 122 S.Ct. 962 (2002) and conflict with *Chambers v. Ohio*, 145 F.3d 793 (6th Cir. 1998) by implication as to binding federal medicaid statutes?

The court should resolve an implied split among the circuits as to whether there is a private right of action under 42 U.S.C. sec. 1983 for the spousal impoverishment court order provisions of 42 U.S.C. sec. 1396-5(f)(3) as well as a conflict with this court's decision in *Wisconsin Dep't v. Blumer*. The implication comes from the failure of the sixth circuit in *Chambers v. Ohio,* 145 F.3d 793 (6th Cir. 1998) to address 42 U.S.C. sec. 1983 cause of actions when it held states had an option to look at couple's income first rather than resources.

The commissioners contend that the patient's state family court action was not an appeal. Def's Respo. p.2. Rec. 1448. The patient contends that the availability of that appeal is the purpose of the statute and cites several authorities including Landsman which says: Landsman, Ron M., "Going to court to improve spousal," *Elderlaw Report*, vol. 10, no.1 (Panel Pub. Sep. 1998). PX44 of plaintiffs' summary judgment brief. Rec. 968.

> Congress wanted to provide relief from the general nationwide rules, whose capacity for taking individual variations into account was limited . . . (I)t assumes that the (local) judges will apply local law standards for support between spouses . . . . Landsman, id., *Elderlaw Rep.* vol. 10, n. 1, p.5. PX44. Rec. 968.

> The interplay of the basic allocation provision and the assignment provisions suggest that Congress thought that there would be cases in which assets are more likely to be separately owned, either second later marriages or first marriages with a significant disparity in the spouses' wealth. Landsman, id., *Elderlaw Rep.* vol.10, no. 1, p.3. PX44. Rec. 970.

Further the federal district court failed to recognize the legislative history at 1998 *U.S. Code Cong. & Ad. News* 803, 894 (PX47. Rec. 946) which said:

> The Committee recognizes that there will be some instances in which the rules set forth in the bill do not take adequate account of the special circumstances affecting a particular community spouse. Id. *House Rept.* No. 100-105(I), p.69, 1988 *U.S.Code Cong. & Admin. News* 803, 892, 894. 1988 U.S.Code C& AN 803. PX47. Rec. 946.

FAILURE OF THE FIFTH CIRCUIT TO FOLLOW ITS OWN PRECEDENT: Did the Fifth Circuit fail to follow its own precedents in finding no private right of action for medicaid recipients under 42 U.S.C. sec. 1983, particularly as to *Smith v. Vowell* and *Evergreen Presbyterian*?

The court should grant the petition because the Fifth Circuit in this case failed to follow its own precedents as to private right of action. *Federal Rule of App. Pro.*, rule 35(a). *Commissioner of Internal Revenue v. Bosch*, 387 U.S. 456, 457 (1967). Stern and Gressman, Supreme Court Practice, sec. 4.6, p. 176 (1993).

The fifth circuit has repeatedly found a private right of action for medicaid applicants and recipients from 1970 in *Smith v. Vowell*, 504 F.2d 759 (5th Cir. 1970), aff'g, 379

F.Supp. 139 (5th Cir. 1974) and in 2002 in *Frazer v. Gilbert*, sub nom., *Frew v. Gilbert*, 300 F.3d 530 (5th Cir. 2002), cert. granted and argued in No. 02-628, sub nom. *Frazer v. Hawkins* (October 7, 2003). There are at least six such favorable decisions. See also *Evergreen Presbyterian v. Hood*, 235 F.3d 908 (5th Cir. 2000), rehearing den., 247 F.3d 243 (5th Cir. 2001). Because the district judge based his decision on the private right of action issue, he erroneously failed to consider the statutory issues of hardship, late application penalty and reopening.

SECRET MEMOS: ISSUE: Did the J. Johnson letter of June 8, 1998 (Appx. 19, PX03. Rec. 1064) constitute secret rules in violation of the due process clause and violate *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970) and conflict with other circuits including *White v. Roughton*, 530 F.2d 750 (7th Cir. 1976). The 1998 Johnson letter said that no state court order of any kind would bind state welfare, plus it implied that there were no favorable precedents or rules. Further the department was intransigent in early negotiation in the face of three hidden favorable memos and the CMS manual provisions. Court dec., p. 9. Rec. 1495.

SECRET MEMOS ISSUE RESTATED: Are there divergent views among the circuits since *Harbury, Ryland* and *Barrett*? These citations are: *Christopher v. Harbury*, 122 S.Ct. 2179 (June 20, 2002), sub nom. *Harbury v. Deutch*, 233 F.3d 596 (D.C.Cir. 2000), rehearing denied, 244 F.3d 956 (D.C. Cir. 2001). See *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983), 586 F.Supp. 1495 (W.D. La. 1984) – prosecutor coverup. *Barrett v. U.S.*, 798 F.2d 565 (2nd Cir. 1986) – synthetic mescaline. Cert. den. sub nom. *Cathell v. Barrett*, 462 U.S. 1131 (1983), 689 F.2d 324 (2nd Cir. 1982). Cert. den. on prior case.

The commissioners here are not seeking to enforce a state statute, nor state regulation published for comment, not even a rule in their Medicaid Eligibility Handbook. They are litigating an ad hoc principle, made up out of whole cloth in violation of federal medicaid law and imposed after taking the case away from the second hearing officer.

None of the commissioners' favorable memos draws the distinctions between the date of court orders and prospective only application of court orders. The commissioners' precedential memos just say that they have to follow the court orders, presumably in their entirety. For among other reasons, so that couples do not have one marital estate adjudicated by the courts and another by the welfare department. For this proposition, the couple cites the cases *Harbury, Motor Vehicle* and *Ryland*. See appellant's brief p. 31-33. *Christopher v. Harbury*, 122 S.Ct. 2179 (June 20, 2002), sub nom. *Harbury v. Deutch*, 233 F.3d 596 (D.C.Cir. 2000), rehearing denied, 244 F.3d 956 (D.C. Cir. 2001). *Motor Vehicle Mfrs. v. State Farm*, 463 U.S. 29 (1970) – ad hoc. *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983), 586 F.Supp. 1495 (W.D. La. 1984).

There are no state welfare regulations on point (Rec.568), but there were three informal memos which made no distinction between prospective and retrospective court orders. They just required state welfare to follow the court orders. Gary Martin, Program Operations Branch, HCFA, *Dallas Regional Medical Services Letter* No. 95-41 (Apr. 3, 1995). PX065. Burt Raiford, *Letter* to P. Atkins-Smith re. Spousal support orders (TDHS, Austin: July 27, 1995). Rec. 1168. PX66. Lynch, Kathy, Case Analyst, *Memorandum re. MAO* application (TDHS, San Antonio May 29, 1996) – two memos. K.T. Whitehead. PX67. Rec.

1165. Nevertheless there was also a favorable federal interpretation at CMS, State Medicaid Manual sec. 3262.2, step. 3 (Oct. 1989). PX64. Rec. 415 – spousal allowances. See this brief p. 3 CMS stands for U.S. Dep't of Health and Human Services, Center on Medicare and Medicaid Services. Like the state memos, the CMS State medicaid manual did not distinguish between prospective and retrospective court orders.

This issue of hearing notice has been extensively briefed by the State Bar Administrative Law Section. Beal, Ron, "Ad hoc rulemaking in Texas," 1 *Tex. Admin. L.J.*, no. 3, p. 35 (June 1992). Cf. Beal, R., "Ad hoc rulemaking . . . judicial review," 42 *Baylor L.Rev.* 459, 474 (1990). Walker, Don, "Ad hoc adjudication," 4 *Texas Admin. Law. J.*, no. 1, p. 31 (Dec. 1996).

PROCEDURAL IRREGULARITIES

There are too many procedural irregularities to uphold the ad hoc decision of state welfare. In addition to taking the decision away from the second hearing officer and thus eliminating the impartial judge, the couple McFadden has counted three other irregularities in the prior issue of this petition: seclusion of informal authorities and distraction from judicial relief. The decision in this matter is devoid of due process and cries for remand to the state hearing officer. The couple cited *Tanik v. Southern Methodist University*, 116 F.3d 775 (5th Cir. 1997), rehearing den. 125 F.3d 854 (5th Cir. 1997), cert. den. 522 U.S. 1015 (1997) – procedural irregularities.

Is any old kind of hearing sufficient for due process? Does due process mean something?

ELEVENTH AMENDMENT BAR

Does a federal statute in a grant in aid program which requires a state agency to follow the decisions of state courts implicate the Eleventh Amendment?

The court should resolve an implied split among the circuits as to whether the federal statute in a grant in aid program which requires a state agency to follow the decisions of state courts implicates the Eleventh Amendment, specifically *Burr by Burr v. Ambach*, 863 F.2d 1071 (2d Cir. 1988), reaff'd 888 F.2d 258 (2nd Cir. 1989), cert. den. 494 U.S. 1005 (1990). Vacated earlier. *Burr by Burr v. Ambach*, other history, 863 F.2d 1071, vacated, sub nom. *Sobol v. Burr*, 492 U.S. 902 (1990).

The district court relied primarily on its prior finding of no federal right of action to find no Eleventh Amendment exception to immunity from suit. The couple argues that there are federal rights and seeks at least the following injunctions:

1. To follow state court orders in full.

2. To count assets from date of institutionalization instead of application.

3. To write rules governing court orders, standards for hardship and revise the reopening rules.

4. To disclose all precedential and informal memos, especially in the hearing context.

> 5. To hang posters and publish flyers as to these rights.

PX110. Rec. 1407.

The patient also asks for declaratory relief particularly to correct the hearing officer's errors of law and remand the case back to the hearing officer. *Burr by Burr v. Ambach*, 863 F.2d 1071 (2d Cir. 1988), handicap school, reaff'd 888 F.2d 258 (2nd Cir. 1989), cert. den. 494 U.S. 1005 (1990), vacated earlier, notes that the hearing officer is a state decision maker unconstrained by the Eleventh Amendment. Like in a constitutionally flawed state criminal trial, this federal court can reach down and order the hearing officer to follow the correct federal rule of law and cure the procedural due process problems of unwritten secret rules and distracted access to judicial review. *Mapp v. Ohio*, 367 U.S. 643 (1961). *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054 (2000) – visitation. The McFaddens further seek an impartial hearing officer. The illegal hearing expands the relief available.

The couple would like to repeat an issue from the court order provision issue.

> Does a federal statute in a grant in aid program which requires a state agency to follow the decisions of state courts implicate the Eleventh Amendment?

Further plaintiffs McFadden allege constitutional torts which allow this district court to reach down to the two fair hearing decisions and also invalidate any reliance on secret rules by the hearing officers and invalidate any failure to follow the state commissioners' own rules. *Russell v. Dunston*, 896 F.2d 664 (2d Cir. 1990). Russell at p. 668 says "We do not agree . . . that the existence of a

past harm renders an otherwise forward-looking injunction retroactive."

CONCLUSION

This court should grant the writ of certiorari and reverse the decision of the Fifth Circuit Court of Appeals or grant other 15 day of January, 2004

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-21285

CHARLES MCFADDEN; DORIS MCFADDEN,
Estate of,

Plaintiffs-Appellants,

versus

ERIC M. BOST, Etc., ET AL.,

Defendants,

DON A. GILBERT, Commissioner of the Texas
Health and Human Services Commission;
JAMES R. HINE, Commissioner,

Defendants-Appellees.

Appeal from the United States District Court for
the Southern District of Texas
(USDC No. H-01-CV-1060)

(Filed Sept. 3, 2003)

Before REAVLEY, JONES and CLEMENT, Circuit Judges.

PER CURIAM:*

We affirm the judgment for the reasons given by the district court in its order dated August 5, 2002.

AFFIRMED.

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHARLES MCFADDEN and ESTATE OF DORIS MCFADDEN, Plaintiffs,	§	
vs.	§	Civil Action # H-01-1060
JAMES R. HINE,[1] Commissioner of the Texas Department of Human Services, and DON A. GILBERT, Commissioner of the Texas Health and Human Services Commission, Defendants.	§	

ORDER

Pending before the Court is Defendants' Second Motion to Dismiss (Document #28). Having considered the motion, submissions, and applicable law, the Court determines that the motion to dismiss should be granted.

I. INTRODUCTION

Charles McFadden and the Estate of Doris McFadden (collectively, "Plaintiffs") filed suit against James R. Hine,

[1] James R. Hine succeeded Eric M. Bost as Commissioner of the Texas Department of Human Services. Therefore, Mr. Hine replaces Mr. Bost as a Defendant in this matter.

Commissioner of the Texas Department of Human Services, and Don A. Gilbert, Commissioner of the Texas Health and Human Services Commission (collectively, "Defendants"). Plaintiffs assert that Defendants' actions regarding judicial review of the spousal impoverishment provisions of the Medicaid Act violated Plaintiffs' federal statutory and constitutional rights. Defendants now move to dismiss, arguing that this Court lacks subject matter jurisdiction over Plaintiffs' claims and that Plaintiffs have failed to state a claim upon which relief can be granted.[2]

II. FACTUAL BACKGROUND

Doris McFadden ("Doris"), the spouse of Charles McFadden ("Charles"), entered a nursing facility on February 21, 1992. She died on August 17, 2000. Shortly after Doris entered the nursing facility, her children filed for guardianship. Probate Court No. 1 of Harris County, Texas supervised the "spenddown" of the McFadden's estate. The probate court declared the estate exhausted in September 1997.

On September 10, 1997, Doris made her first application for Medicaid assistance.[3] The Texas Medicaid agency (i.e., the Texas Department of Human Services ("TDHS"))

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[2] Plaintiffs also filed a motion for summary judgment. *See* Document #32. Plaintiffs ask that the Court consider the arguments contained in their motion for summary judgment in ruling on Defendants' motion to dismiss. The Court has reviewed the motion for summary judgment in making its determinations herein.

[3] The Medicaid program in Texas is a voluntary, cooperative state/federal program designed to provide necessary medical services to certain low income or medically needy individuals.

determined that Doris was not eligible for Medicaid because the combined resources of Doris and Charles, at the time when Doris entered the nursing facility in 1992, totaled $232,228.00. After calculating all allowances, TDHS determined that Doris's available resources exceeded those that could be recognized by the agency. Thus, TDHS determined that Doris was ineligible for Medicaid funds for her nursing care. Doris appealed that decision and obtained a fair hearing as required by Medicaid, 42 U.S.C. § 1396(a)(3). On December 17, 1997, the Medicaid hearing officer upheld the agency's denial of Medicaid eligibility.

In January 1998, Doris contacted TDHS in an attempt to have the hearing officer's decision reversed, arguing that the McFaddens' prenuptial agreement and guardianship documents constituted a court-ordered spousal support order for purposes of 42 U.S.C. § 1396r-5(f)(3). Section 1396r-5(f)(3) provides that if a court has entered an order *against* an institutionalized spouse for the support of the community spouse, an amount transferred pursuant to that order for the support of the community spouse will be considered to be the Protected Resource Allowance ("PRA")[4] and will not be counted as a resource to the institutionalized spouse. 42 U.S.C. § 1396r-5(f)(3) (Supp. 2002) (emphasis added). Under this provision, the agency deducts from the couple's combined resources an amount transferred under a court support order. *See id.*

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[4] The PRA is that portion of the total assets of an institutionalized spouse and the community spouse that can be protected for the use of the community spouse and not considered a resource in the eligibility determination of the institutionalized spouse.

TDHS determined that a probate court had not entered an order *against* Doris for the support of Charles. TDHS further determined that any division of property by the probate court did not affect the attribution of resources because the Social Security Act provides that all resources held by either spouse, regardless of any state laws relating to community property or the division of marital property, are considered to be available to the institutionalized spouse. TDHS thus concluded that all resources of both spouses were available to Doris in September 1997 despite any property division by the probate court. TDHS also determined that the couple's prenuptial agreement did not affect the determination that all resources were available to Doris in September 1997.

Thereafter, in October 1998, Charles obtained a spousal support order against Doris from the 312th Judicial Court of Harris County, Texas. The order was signed on October 22, 1998. The language in the order purported to protect resources for Charles in the amount of $250,000.00 from September 1, 1997 onward.

On November 17, 1998, Doris again applied for Medicaid benefits. At the time of the application, the combined resources for Doris and Charles totaled $118,110.00. TDHS again denied Doris's application for Medicaid benefits because of excess resources. Doris requested consideration of hardship as permitted by TDHS policy, but TDHS concluded that none of the agency's provisions regarding hardship applied.

Doris again appealed the denial of her application for Medicaid benefits. At the fair hearing, Doris argued that the PRA should be increased to the amount protected by the state court's order of October 22, 1998. On April 6,

1999, the hearing officer reversed the denial of benefits and referred the issue to TDHS's legal division to consider whether the October 22, 1998 order was a valid order to increase the amount set aside for support of Charles, the community spouse. TDHS's legal department determined that the state court order was a valid order for spousal support in the amount of $250,000.00, effective October 22, 1998 – the date the state order was signed – not the September 1, 1997 "protection" date referenced in the court's order. Therefore, on May 21, 1999, TDHS determined that Doris was eligible for Medicaid benefits beginning November 1, 1998.[5] TDHS determined that prior to October 22, 1998, there was no court order *against* Doris for support of Charles; therefore, no resources could have been transferred until October 22, 1998, the date the order was signed. Accordingly, despite the reference in the state court order to the protection date of September 1, 1997, under federal law the entire amount of the couple's resources (in excess of the federally set maximum PRA) was available to Doris until the $250,000.00 was transferred pursuant to the October 22, 1998 order.

In the instant suit, Plaintiffs claim that TDHS erred because it did not give full effect to the state court order of October 22, 1998. Specifically, Plaintiffs assert that Doris should have been eligible for Medicaid beginning September 1, 1997, based on the fact that the state court order provided that $250,000.00 was protected from September 1, 1997 onward.

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[5] November 1998 was the first month in which the couple's resources were not available to Doris.

Plaintiffs bring claims under 42 U.S.C. § 1983 for deprivation of due process and equal protection. Plaintiffs also assert claims under 42 U.S.C. §§ 1396r and 1396a, which, according to Plaintiffs, provide an implied private right of action. Plaintiffs seek declaratory and injunctive relief as well as money damages.

III. DEFENDANT'S MOTION TO DISMISS

Defendants move to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Rule 12(b)(1) provides that the Court must dismiss the plaintiff's complaint if the court lacks subject matter jurisdiction. FED. R. CIV. P. 12(b)(1). Dismissal is proper only when "it appears certain that the plaintiffs cannot prove any set of facts in support of their claim which would entitle them to relief." *E.g.*, *Robinson v. TCI/US W. Communications, Inc*, 117 F.3d 900, 904 (5th Cir. 1997). A court may base its disposition of a motion to dismiss for lack of subject matter jurisdiction on (1) the complaint alone; (2) the complaint supplemented by undisputed facts; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Id.* The standard of review for a motion to dismiss for lack of subject matter jurisdiction is the same as the standard of review for a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6). *E.g.*, *Benton v. United States*, 960 F.2d 19, 21 (5th Cir. 1992). A motion to dismiss under Rule 12(b)(6) tests the formal sufficiency of the statement of the claim for relief in the complaint. *E.g.*, *Doe v. Hillsboro I.S.D.*, 81 F.3d 1395, 1401 (5th Cir. 1996).

Defendants argue that Plaintiffs cannot show any basis for eligibility for the Texas Medicaid program earlier than November 1, 1998 and that because none of the facts they allege demonstrate a violation of any federal right, they fail to state a claim upon which relief may be granted. Further, Defendants contend that the Court lacks subject matter jurisdiction under the Eleventh Amendment because there is no federal right to be vindicated. According to Defendants, "what Plaintiff is attempting to do is to have this federal District Court review the eligibility determination made by the agency responsible for administering the Medicaid program in the state of Texas. There is no federal right to judicial review of a final decision made by the agency administering the Medicaid program. This final decision is the decision that is rendered subsequent to the federally required due process or fair hearing that is required by federal law."[6]

Right to Judicial Review Under 42 U.S.C. § 1396r-5(f)(3)[7]

Doris received fair hearings on her applications for Medicaid. She ultimately received Medicaid benefits after

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[6] Defendants cite 42 U.S.C. § 1396a(a)(3) and 42 C.F.R. § 431.200 *et seq.* for this proposition.

[7] Section 1396r-5(f)(3) states:

> If a court has entered an order against an institutionalized spouse for the support of the community spouse, section 1396p of this title shall not apply to amounts of resources transferred pursuant to such order for the support of the spouse or a family member (as defined in subsection (d)(1) of this section).

42 U.S.C. § 1396r-5(f)(3) (Supp. 2002). Section 1396p discusses provisions for liens, adjustments and recoveries, and transfers of assets. *See id.* § 1396p.

a second fair hearing and consideration from TDHS's legal department, although she received the funds from a later date (November 1998) than she had requested (September 1997). If there were a right to judicial review from this final agency decision, such right would be provided by state law; and in Texas, there is no right to judicial review of the decision of the hearing officer in a case involving the eligibility determination in the Medicaid program. *See* TEX. GOV'T CODE ANN. § 2001.223(1) (Vernon 2000); *see also Blair v. Tex. Dep't of Human Servs.*, 837 S.W.2d 670, 672 (Tex. App. – Austin 1992, writ denied) (stating that judicial review of TDHS eligibility determinations "would provide only minimal additional protection to Medicaid applicants at a potentially enormous cost to the government"). According to these principles, the Court determines that Plaintiffs have not identified a right to federal district court review of TDHS's eligibility determinations in this case.

§ 1983

Plaintiffs bring claims under § 1983 for violations of due process (prohibition on secret rules) and equal protection (discrimination against late medicaid applications and reopenings of medicaid denials). Plaintiffs also assert various statutory claims under § 1396, which they claim provide an implied private right of action under § 1983.

First, Plaintiffs have failed to state a claim upon which relief can be granted regarding their due process and equal protection claims. As discussed above, Defendants complied with all due process requirements through the fair hearings provided to Doris. *See, e.g., Blair*, 837 S.W.2d at 672. Further, Plaintiffs have failed to allege a

legally cognizable equal protection claim concerning discrimination against "late" applications or how the Medicaid Act provides for any "reopening right" regarding denials of Medicaid eligibility.[8]

Second, Plaintiffs' claimed private rights of action under § 1396 fail to state a claim upon which relief may be granted. Again, the primary issue as asserted by Plaintiffs relates to "the judicial review provisions of the spousal impoverishment provisions of the [Medicaid Act, 42 U.S.C. § 1396r-5(f)(3)]."[9] Where, as here, the plaintiff asserts a claim under § 1983, the plaintiff must assert the violation of a federal right, not merely a violation of a federal law. *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). A statute confers a federal right only if:

1. Congress intended that the provision in question benefit the plaintiff;

2. The asserted right is not so vague and amorphous that enforcement would strain judicial competence, i.e., the right is sufficiently specific and definite; and

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[8] In their amended complaint, Plaintiffs in fact concede (as merely one example) that they have found no support for a federal "reopening right" under the Medicaid program.

[9] Plaintiffs also claim that §§ 1396r-5(f)(3) and (c)(2) provide a federal right to a "half spenddown rule." The Court has reviewed these statutes and finds no such "rule" contained therein. Plaintiffs also contend that § 1396r-5(c)(2) contains, as a federal right, and exception for hardship. This provision contains no such exception. In addition, Plaintiffs assert "rights" under §§ 1396a(a)(4), (8) and (19), concluding without support that these provisions provide federal rights of action. The Court has found no basis for a federal private right of action in these statutes and thus determines that Plaintiffs have failed to state a claim upon which relief may be granted relative to these provisions.

3. The challenged statute unambiguously imposes a binding obligation on the states; i.e., the provision giving rise to the asserted right is couched in mandatory terms and reflects more than a Congressional preference for certain conduct.

E.g., *Blessing*, 520 U.S. at 340-41. Unless all three criteria are met, dismissal of the plaintiff's case is in order. *Id.* at 342. Furthermore, the plaintiff must identify with particularity the rights claimed under a specific statutory provision. *Id.* "Only when the complaint is broken down into manageable analytic bites can a court ascertain whether each separate claim satisfies the various criteria we have set forth for determining whether a federal statute creates rights." *Id.*

Plaintiffs cannot satisfy the *Blessing* test in this case, as they cannot demonstrate any right to eligibility for Medicaid benefits under federal law. In enacting the Medicaid program, Congress gave states flexibility in creating policies and procedures to determine eligibility for Medicaid. Texas has established resource criteria involving the assets of medicaid applicants who are institutionalized in a nursing facility. In the McFaddens' case, Doris was not eligible for Medicaid benefits until a spousal support order was entered against her, which occurred on October 22, 1998. Prior to this order, Doris was not eligible for Medicaid because she had too many resources. TDHS's determinations do not constitute the violation of a federal right, especially when considering that Doris was granted the requisite fair hearings to appeal her denials. Moreover, Plaintiffs have not evidenced a violation of any other rights under the Medicaid Act, nor have they demonstrated a right to judicial review under the Medicaid Act

in the federal court system. Accordingly, there is no legally sufficient basis for Plaintiffs to assert a claim under § 1983 for alleged violations pertaining to § 1396 in this case.

Eleventh Amendment Immunity

Defendants also argue that Plaintiffs' § 1983 claims are barred by the Eleventh Amendment to the United States Constitution. The Eleventh Amendment deprives federal courts of jurisdiction over suits against non-consenting state officials. *E.g.*, *United States v. Texas Tech Univ.*, 171 F.3d 279, 285 (5th Cir. 1999). The only legitimate basis for federal court intervention consistent with the Eleventh Amendment is the vindication of federal rights. *E.g.*, *Lelsz v. Kavanagh*, 807 F.2d 1243, 1252 (5th Cir. 1987). The Court has already determined *supra* that Plaintiffs have failed to allege the vindication of any federal rights in their amended complaint. Accordingly, this Court lacks subject matter jurisdiction over Plaintiffs' claims. *See id.*

Moreover, *Ex Parte Young* does not permit suit against the state. The *Young* doctrine provides an exception to immunity when the plaintiff seeks prospective injunctive relief against a state official in his official capacity. *Ex Parte Young*, 209 U.S. 123 (1908). Here, there is no application for the *Young* exception because there is no continuing violation of a federal right.

In accordance with the foregoing, the Court determines that it lacks subject matter jurisdiction over Plaintiffs' claims and that Plaintiffs have failed to state a claim upon which relief may be granted. Therefore, the Court hereby

ORDERS that Defendants' Second Motion to Dismiss (Document #28) is GRANTED. Plaintiffs' claims against James R. Hine, Commissioner of the Texas Department of Human Services, and Don A. Gilbert, Commissioner of the Texas Health and Human Services Commission, are hereby DISMISSED.

SIGNED at Houston, Texas, on this 5 day of Aug, 2002.

/s/ David Hittner
DAVID HITTNER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHARLES MCFADDEN and ESTATE OF DORIS MCFADDEN,	§	Civil Action # H-01-1060
Plaintiffs,	§	
vs.	§	
JAMES R. HINE,[1] Commissioner of the Texas Department of Human Services, and DON A. GILBERT, Commissioner of the Texas Health and Human Services Commission,	§	
Defendants.	§	

FINAL JUDGMENT

As the Court has granted Defendants' motion to dismiss, the Court hereby

ORDERS that judgment be entered in favor of Defendants. Plaintiffs shall take nothing from Defendants. This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, on this 5 day of Aug, 2002.

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[1] James R. Hine succeeded Eric M. Bost as Commissioner of the Texas Department of Human Services. Therefore, Mr. Hine replaces Mr. Bost as a Defendant in this matter.

/s/ David Hittner
DAVID HITTNER
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-21285

CHARLES MCFADDEN; DORIS MCFADDEN, Estate of

Plaintiffs-Appellants

v.

ERIC M BOST, Etc; ET AL

Defendants

DON A GILBERT, Commissioner of the Texas Health and Human Services Commission; JAMES R HINE, Commissioner

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING

(Filed Oct. 17, 2003)

Before REAVLEY, JONES and CLEMENT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT

/s/ Thomas M. Reavley
United States Circuit Judge

REHG-2

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

Texas [LOGO]
Department
of
Human Services

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June 8, 1998

Mr. Jeff Skarda
Attorney-at-Law
725 Main Street, Room 237
Post Office Box 52730
Houston, Texas 77052-2730

Dear Mr. Skarda:

This is in response to your letter of May 6, 1998, to Bucky Olive, Program Specialist, Client Eligibility Section, relative to Doris D. McFadden, who entered a nursing facility (NF) in 1992 and has applied for medical assistance only (MAO).

Attached to your letter was a petition for spousal support, filed by Charles H. McFadden, husband to Doris McFadden, and a draft district court judgment, which would partition the property of the couple and increase the community spouse's (Charles McFadden's) monthly income from $2,271 to $3,521. You ask how this spousal support order would be treated for Medicaid eligibility purposes.

These documents were reviewed by our Office of General Counsel (OGC). The Texas Department of Human Services (TDHS) is not a party to this litigation and is therefore not bound by any decision resulting from these proceedings.

Should you have questions, please contact Elmo Johnson, OGC, at (512) 438-3092, or Mr. Olive at (512) 438-3713.

Sincerely,

/s/ Jackie Johnson
Jackie Johnson
Interim Deputy Commissioner
Office of Programs

JJ:dc